CONGRESSIONAL CONTROL OF PRESIDENTIAL WAR-MAKING UNDER THE WAR POWERS ACT: THE STATUS OF A LEGISLATIVE VETO AFTER *CHADHA*

When compared to the debate over the threat posed by American and Soviet capability to commence a full-scale nuclear exchange at a moment's notice, discussion of the Constitution's allocation of war powers between Congress and the President has an anachronistic ring to it. Yet, notwithstanding the spectre of rapid deployment by either of the superpowers, the allocation of certain war powers to Congress continues to be an important consideration in presidential foreign policy decisions. As the Vietnam experience suggests, the success or failure of a presidential deployment of military personnel and war materiel in hostilities outside the United States is likely to hinge on whether and to what extent the President is able to obtain the support and cooperation of Congress.[1]

In the wake of several presidentially initiated military actions during the last thirty years, debate has raged over whether the President or Congress is entrusted with the "war powers."[2] Since the final years of the Vietnam War, politicians and commentators have sought to reconcile the constitutional delegation of war powers to Congress with the historical practice of presidential deployment of military forces in foreign conflicts without congressional approval.[3]

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[1] *See* Bickel, *Congress, the President and the Power to Wage War*, 48 CHI-KENT L. REV. 131, 147 (1971) ("[I]f Congress won't take the country into war, Presidents . . . are only heading for failure.").

[2] The term "war powers" refers both to the power to declare and wage war and to the powers exercised by the government over the populace in times of war. This Comment focuses on the allocation of the power to declare and wage war between the executive and legislative branches and does not address the question of what limits are to be placed upon the governmental exercise of war powers. *See generally* C. A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 15 (1921) ("[S]tatesmen and commentators have held that since it is impossible to foresee what may be the exigencies or circumstances endangering the public safety, therefore 'no constitutional shackles can wisely be imposed,' and none are imposed upon the so-called war powers. . . . [T]he war powers . . . are limited only by the laws and usages of nations." (footnotes omitted)).

[3] For an historical overview of major United States armed actions overseas and associated congressional action, see FOREIGN AFFAIRS DIV., LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS FOR THE SUBCOMM. ON NAT'L SEC. POLICY AND SCIENTIFIC DEVS. OF THE COMM. ON FOREIGN AFFAIRS, 91ST CONG. 2D SESS., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES 39-49 (Comm. Print 1970); *see also* Wormuth, *The Vietnam War: The President Versus the Constitution, reprinted in* SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CON-

In 1973, in an effort to exercise control over "presidential" wars, Congress enacted the War Powers Act.[4] Its passage signaled a reversal of previous congressional acquiescence in the presidential use, without congressional authorization, of military power in pursuit of foreign policy objectives.[5] Some in Congress saw the Act as effecting even more fundamental changes. One congressman stated that the task before Congress was to draw "upon the experience of Vietnam to call for a basic reappraisal of the way this Nation involves itself in war" and to restore the "proper constitutional balance between Congress and the President."[6]

The War Powers Act requires the President in every possible instance to consult with Congress before introducing United States forces into hostilities and to submit a written report within forty-eight hours of utilizing American forces in certain military activities absent a declaration of war.[7] The Act's most controversial aspects are the termination provisions. The Act requires that within sixty days of the expiration of the forty-eight hour reporting period the President must terminate the deployment of forces unless Congress has affirmatively authorized such use.[8] Furthermore, the Act provides that at any time Congress can direct the President by concurrent resolution to remove United States forces from hostilities.[9]

The recent Supreme Court decision in *Immigration and Naturalization Service v. Chadha*[10] has raised concerns about the Act's concurrent resolution provision, which enables Congress to terminate a presidential military deployment. Although Congress has yet to invoke the concurrent resolution provision, the constitutionality of this provision stands at issue because of its resemblance to the legislative veto declared

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GRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 142 (Comm. Print 1970).

[4] War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981). This Comment will refer to the statute as the "War Powers Act" to distinguish it from the various case-by-case congressional resolutions that are part of the enforcement of the statute.

[5] The stated purpose of the Act is to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations." 50 U.S.C. § 1541(a) (1976).

[6] *War Powers Legislation, Hearings Before the Subcomm. on Nat'l Sec. Policy and Scientific Dev. of the Comm. on Foreign Affairs, House of Representatives*, 92d Cong., 1st Sess. 2 (1971) [hereinafter cited as *Hearings, War Powers Legislation*] (statement of Rep. Dante Fascell).

[7] 50 U.S.C. §§ 1542, 1543 (1976).

[8] *Id.* § 1544(b).

[9] *Id.* § 1544(c).

[10] 103 S. Ct. 2764 (1983).

unconstitutional in *Chadha*.[11]

This Comment analyzes the constitutionality of the Act's concurrent resolution provision in light of the principles articulated by the Supreme Court in *Chadha*. Part I discusses the factors that motivated passage of the War Powers Act and reviews the specific provisions of the Act, focusing on the concurrent resolution provision.

The second part of the Comment looks at *Chadha*. It outlines the Court's reasoning and identifies two principles that emerge from *Chadha* and that threaten the concurrent resolution provision of the War Powers Act. This part closes with the suggestion that the applicability of the *Chadha* principles to the Act will depend upon two factors: (1) the constitutional allocation of the war powers between Congress and the President, and (2) the effect of congressional exercise of the termination provision in the War Powers Act on that allocation.

Part III considers the first factor, the constitutional allocation of war powers. It concludes that there are two credible views as to how these powers are apportioned between the executive and legislative branches. First, the powers may be under the exclusive control of Congress, with only narrow exceptions for unilateral presidential action. Alternatively, the powers may be shared, with the President enjoying much greater latitude to employ military force without congressional approval.

Part IV considers the second factor, the operative effect of the War Powers Act. Drawing on the two perspectives discussed in part III, this part suggests three different interpretations of the impact of the Act on the constitutional allocation of the war powers between the branches.

Finally, part V discusses the constitutionality of the Act's concurrent resolution provision. It measures the effect of congressional exercise of the provision, as suggested by each of the three interpretations of the Act mentioned in part IV, against the principles articulated in *Chadha* and discussed in part II. This part demonstrates how, in light of *Chadha*, the constitutionality of the provision will turn on the accepted interpretation of allocation of war powers between the two

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[11] A legislative veto is a technique used by Congress that permits it to "delegate broad powers of domestic initiative to the President or to various agencies, subject to a veto power exercisable by Congress as a whole, by one House, or by a committee." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-2, at 161 (1978) (footnote omitted). Tribe further notes, "There is some appeal in the argument that any congressional veto of an executive or administrative act taken pursuant to a prior delegation must constitute either a usurpation of the judicial function of interpreting the scope of the original delegation, or a change in that delegation's initial scope." *Id.* at 162. He concludes that finding such a technique unconstitutional would exalt rigid formulas in an area where doctrine must be responsive to basic problems of political accountability. *See id.* at 162-63.

branches and on the operative effect of the War Powers Act.

I. CONGRESS ASSERTS ITS WAR POWERS: THE WAR POWERS ACT

Events during the Vietnam War demonstrated to Congress that the President enjoyed tremendous discretion, even in the absence of a formal declaration of war, to continue American involvement in military hostilities once the President had seized the initiative. Two forces moved Congress to take action to limit presidential war-making: a concern that no war could successfully be conducted without popular approval and a realization that the courts would not limit presidential war-making.

A. Political Need for Congressional Involvement in the Exercise of the War Powers

By vesting the power to declare war in Congress,[12] the Framers clearly intended to make the commitment of the nation to war an extraordinary exercise of the popular will. In the words of Justice Story,

> [T]he power of declaring war is not only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. . . . The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its propriety and necessity. The executive is to carry it on, and therefore should be consulted as to its time, and the ways and means of making it effective.[13]

The truth of Justice Story's admonition that committing the country to war requires the utmost deliberation and the review of all councils of the nation was revealed by the experience of presidential war-making in Vietnam. During the final tumultuous years of the war in Southeast Asia, the Nixon administration sought "consultation, mutual trust and continuing political interaction" among Congress, the President, and the electorate.[14] The intensity of public protest against the war, however, combined with congressional inability to legislate a de-

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[12] U.S. CONST. art. I, § 8, cl. 11.

[13] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1171 (T. Cooley 4th ed. 1873).

[14] *See Hearings, War Powers Legislation, supra* note 6, at 53-54 (statement of John R. Stevenson, Legal Advisor, U.S. Department of State).

escalation,[15] had a marked effect on Congress. This was best described by Alexander Bickel, who wrote that "[t]he one thing we and the world have learned from the Vietnam experience is that without understanding why we fight, and without the will to fight as a nation, we cannot fight effectively."[16]

B. *The Courts Refuse to Place Limits on Presidential War-Making*

In 1964 Congress delegated broad war-making authority to President Johnson with passage of the Tonkin Gulf Resolution;[17] in 1971, however, it repealed the Resolution.[18] Thereafter, many suits were filed in which the courts were requested to enjoin further prosecution of the war on the grounds that continued military action in Vietnam was unconstitutional because the President was acting without requisite congressional authority. The courts uniformly denied these requests, refusing to place limits on presidential war powers.

In one line of cases, the courts found that, contrary to the assertions of the plaintiffs, Congress had given its blessing to the war effort.[19] These courts found that various actions taken by Congress could be interpreted as endorsing continued military action and, thus, that the President was not acting without congressional authorization.[20]

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[15] For a summary of congressional efforts to de-escalate American involvement in Vietnam, see A. THOMAS & A. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 119-28 (1982).

[16] Bickel, *supra* note 1, at 147.

[17] Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), *repealed by* Foreign Military Sales Act, Pub. L. No. 91-72, § 12, 84 Stat. 2053, 2055 (1971). According to § 2 of the Resolution,

> The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. . . . [T]he United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

[18] *See* Foreign Military Sales Act, Pub. L. No. 91-72, § 12, 84 Stat. 2053, 2055 (1971).

[19] *See* Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1368, 1369-70 (2d Cir. 1971) (per curiam); Orlando v. Laird, 443 F.2d 1039, 1042-43 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973).

[20] *See supra* note 19. In addition to relying on appropriations and extension of the draft law, the Nixon administration based its contention of congressional authorization on Senate ratification of the Southeast Asia Treaty and the United Nations Charter, arguing that ratification of these treaties effectively had delegated war-making authority to the President. *See* Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 21 (1972).

Orlando v. Laird[21] exemplifies this approach. In *Orlando* the Second Circuit rejected the contention that the repeal of the Tonkin Gulf Resolution nullified the President's authority to continue the war. It noted that "[t]he repeal was based on the proposition that the Resolution was no longer necessary and amounted to no more than a gesture on the part of the Congress at the time the executive had taken substantial steps to unwind the conflict."[22] The court also considered congressional action extending conscription and appropriating funds for the war.[23] It concluded that there was sufficient evidence that "Congress and the Executive have taken mutual and joint action in the prosecution and support of military operation in Southeast Asia from the beginning of those operations"[24] to support a judicial inference that Congress had authorized the President's actions.

According to the court, congressional authorization of presidential war-making need not be explicit. It reasoned that the "framers' intent to vest the war power in Congress was in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war."[25] Refusing to impose a fixed process or fixed standards upon Congress's war-making authority, the court stated, "Beyond determining that there has been *some* mutual participation between the Congress and the President . . . it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operation in Southeast Asia is a political question."[26]

In a second line of cases, the courts declined even to address the issue of the constitutionality of the continuation of the war on the grounds that the political question doctrine rendered the cases nonjusticiable.[27] In *Holtzman v. Schlesinger*,[28] for example, the Second Circuit

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[21] 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

[22] *Orlando*, 443 F.2d at 1041 n.1. For the official congressional report on this issue, see S. REP. NO. 865, 91st Cong., 2d Sess., *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 6069. *But see* Van Alstyne, *supra* note 20, at 20-21 (arguing that repeal of Tonkin Gulf Resolution removed all of President's constitutional authority to continue war effort in Southeast Asia).

[23] *Orlando*, 443 F.2d at 1042-43.

[24] *Id.* at 1042.

[25] *Id.* at 1043.

[26] *Id.*

[27] *See* Mitchell v. Laird, 488 F.2d 611, 615-16 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *see also Orlando*, 443 F.2d at 1043. *See generally* L. FRIEDMAN & B. NEUBORNE, UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE LEGALITY OF THE WAR IN VIETNAM (1972) (describing *Berk v. Laird*, companion case to *Orlando*); E. KEYNES, UNDECLARED WAR 60 (1982).

[28] 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

wrote, "While we . . . may well agonize and bewail the horror of this or any war, the sharing of Presidential and Congressional responsibility at this juncture is a bluntly political and not a judicial question."[29]

The message of cases like *Orlando* and *Holtzman*—that the courts would not impose limits on presidential war powers—combined with the sentiment that successful war-making required popular support, persuaded Congress that it needed to legislate a process and standards for the initiation and conduct of future American military action. The result was the War Powers Act.

C. *Provisions of the War Powers Act*

Despite the Nixon administration's contention that the respective roles and capabilities of the President and Congress were best left to the political process,[30] Congress was convinced that express legislative action was needed to redress what that body perceived as presidential usurpation of congressional war powers. As it considered war powers legislation during 1972 and 1973, Congress had two choices. First, it could legislate a flat ban on presidential military deployment in all but the most compelling circumstances. This might have been a logical response to *Orlando*, but it presented obvious political and constitutional difficulties.[31] Alternatively, Congress could steer a more moderate course and subject presidential military deployments to closer congressional scrutiny. It chose this latter option when, in 1973, over President Nixon's veto, it enacted the War Powers Act.[32]

The Act seeks to circumscribe presidential use of military forces in specific circumstances. Senator Jacob Javits, cosponsor of the Senate bill that emerged from a joint conference committee to become the War Powers Act, explained that "[i]n this bill we are dealing with *undeclared wars*—wars which have come to be called Presidential wars because the constitutional process of obtaining Congressional authorization has been short-circuited."[33] Therefore, the Act addresses situations where, in the absence of a declaration of war, American troops are introduced

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[29] *Holtzman*, 484 F.2d at 1311.

[30] *Hearings, War Powers Legislation, supra* note 6, at 53-54 (statement of John R. Stevenson, Legal Advisor of Department of State).

[31] Several witnesses, in testimony before a subcommittee of the House Committee on Foreign Affairs, had cautioned against imposing rigid restrictions on the President's power to deploy military force in all situations and had argued that such restrictions might be unconstitutional. *See id.* at 97-105 (statement of Professor John Norton Moore); *id.* at 122, 131 (statement of Secretary of State William Rogers).

[32] 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981).

[33] 119 CONG. REC. 1398 (1973).

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . . .[34]

In these situations the Act requires that the President begin reporting to and consulting with Congress within forty-eight hours of initial deployment.[35]

The Act also contains a declaratory section[36] stating that no provision of the Act or concurrent resolution issued under the Act shall be construed "to alter the constitutional authority of the Congress or of the President"[37] or to grant "any authority to the President with respect to the introduction of the United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have in the absence" of the Act.[38] In the words of Senator Javits, the purpose of this nondelegation language is to place "the burden on the Executive to come to Congress for specific authority."[39] This language also addresses the delegation problem raised by cases such as *Orlando* by declaring that congressional endorsement of introduction of American forces into hostilities shall not be inferred from any law or appropriations act unless such law or act "specifically authorizes the introduction of United States Armed Forces into hostilities."[40]

The most controversial aspects of the Act are the two termination provisions. The first mandates that deployment of troops be terminated within sixty days of the commencement of the reporting period unless Congress expressly authorizes otherwise.[41] The second termination pro-

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[34] 50 U.S.C. § 1543(a).
[35] *Id.*
[36] *Id.* § 1547.
[37] *Id.* § 1547(d)(1).
[38] *Id.* § 1547(d)(2).
[39] 119 CONG. REC. 1400 (1973).
[40] 50 U.S.C. § 1547(a)(1).
[41] *Id.* § 1544(b). The Act stipulates that the President shall terminate the deployment of United States military forces within 60 days of the commencement of the reporting period unless the Congress: "(1) has declared war or has enacted a specific authorization for such use . . . , (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States." *Id.*

vision, the focus of this Comment, enables Congress at any time, by concurrent resolution, to direct the President to withdraw forces "engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization."[42]

A concurrent resolution, unlike a bill or joint resolution, does not go to the President for approval[43] and thus avoids the possibility of a presidential veto of a congressional resolution directing the President to withdraw United States forces. Furthermore, Representative Clement Zablocki, sponsor of the House bill, noted that the choice of a "nonvetoable method" grew out of Congress's understanding of the Constitution's commitment to Congress of the power to declare war:

> Our purpose . . . was to provide Congress with a two-barrel approach . . . to ending a commitment of troops ordered by the President. The first of that so-called two-barrel approach involves the 60-day period . . . .
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> The second barrel . . . involves the concurrent resolution which we regard as a statutorily legal method of ending the commitment of troops. The thought behind the desirability of the concurrent resolution route is obvious: since the Constitution gives Congress—and only Congress—the power to declare war, Congress had to have a nonvetoable method of demonstrating, if it so chose, that it did not wish to declare war, even before the expiration of the 60-day period. We recognized that the Constitution clearly states that the President is Commander in Chief but it also states with even

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If the President "determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces," the initial 60-day period is extended for not more than 30 days. *Id.*

While not addressing the issue, this Comment assumes the 60-day limit to be constitutional. For support of this position, see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 103 (1972).

The Act's reporting requirements and 60-day limitation address a problem that recurred during the Vietnam war when the executive branch acted on its own initiative and consulted with Congress only when it required appropriations or extensions of the draft law. *See* Wormuth, *supra* note 3, at 54-58.

These provisions infuse an element of political accountability into the actions of both the President and Congress, *see* 119 CONG. REC. 1399 (1973) (statement of Sen. Javits), an element critics of the Vietnam War found sorely lacking, *see, e.g.*, M. PUSEY, THE WAY WE GO TO WAR 8 (1969).

[42] 50 U.S.C. § 1544(c).

[43] *See* H. LINDE & G. BUNN, LEGISLATIVE AND ADMINISTRATIVE PROCESS 131 (1976).

greater clarity that only Congress can declare war.[44]

However, notwithstanding the advantages the nonvetoable termination provision of the Act may offer Congress, the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*[45] raises serious questions about the constitutionality of such a device.

II. The Supreme Court Declares the Legislative Veto Unconstitutional: *Immigration and Naturalization Service v. Chadha*

A. *Background of the Case*

The *Chadha* case[46] arose from deportation proceedings begun by the Department of Justice in 1973 against Chadha, an East Indian student whose visa had expired in 1972. An immigration judge suspended the deportation after concluding that Chadha would suffer " 'extreme hardship' if deported."[47]

Under the Immigration and Nationality Act,[48] Congress had retained the authority to review any suspension of deportation granted an alien and provided that if

> either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's departure at his own expense . . . . If . . . neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.[49]

On December 16, 1975, the House of Representatives vetoed the suspension of Chadha's deportation.[50] Deportation proceedings were reopened, and Chadha was ordered deported pursuant to the House action.[51]

Chadha appealed the refusals of the immigration judge and of the Board of Immigration Appeals to terminate his deportation, contending

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[44] *The War Powers Resolution: A Test of Compliance, Hearings Before the Subcomm. on Nat'l Sec. Policy and Scientific Dev. of the House Comm. on Foreign Affairs*, 94th Cong., 1st Sess. 93 (1975) (statement of Rep. Zablocki).

[45] 103 S. Ct. 2764 (1983).

[46] Immigration and Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983).

[47] *Id.* at 2770.

[48] 8 U.S.C. §§ 1101-1525 (1982).

[49] *Id.* § 1254(c)(2), *quoted in Chadha*, 103 S. Ct. at 2771.

[50] *Chadha*, 103 S. Ct. at 2771.

[51] *Id.* at 2772.

that the congressional veto provision of the Immigration and Nationality Act was unconstitutional. The Ninth Circuit agreed, holding that the veto provision was unconstitutional as applied to Chadha, and ordered the Attorney General " 'to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives.' "[52] In a 7-2 opinion the Supreme Court affirmed.

B. *Supreme Court Resolution—The Problem of Legislative Overreaching*

Justice Burger's majority opinion in *Chadha* focused on the fact that in the Immigration and Nationality Act Congress had delegated to the executive branch authority to administer immigration policy but had reserved the power to withdraw or amend the delegation without bicameral approval or presentment to the President. According to Justice Burger, Congress's seemingly ad hoc review and redefinition of the Act's deportation standards undermined the Constitution's safeguards against "oppressive, improvident, or ill-considered measures."[53] Although it might have been a "convenient shortcut" for Congress to alter the legal effect of executive branch actions without enacting legislation subject to the President's approval, such a procedure offended the Framers' "desire to define and limit the exercise of the newly created federal powers" and the "unmistakable expression . . . that legislation by the national Congress be a step-by-step, deliberate and deliberative process."[54] The limits upon legislative power that the Framers conceived soon would evaporate if Congress could condition delegations to the executive branch upon the retention of a prerogative for Congress to review and extra-legislatively to veto executive branch decisions.[55]

The legislative veto provision of the Immigration and Nationality Act was constitutionally objectionable because it circumvented two clauses of the Constitution: the bicameralism and presentment requirements of article I.[56] Congress's attempt to circumvent the presentment requirement is the central separation of powers problem posed by the legislative veto because it disables a coordinate branch of government from exercising its constitutional powers. Thus, the President is unable to exercise the power reserved to him by section 7 of article I to approve or veto congressional action:

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[52] *Id.* (quoting Chadha v. INS, 634 F.2d 408, 436 (9th Cir. 1980)).
[53] *Chadha*, 103 S. Ct. at 2782.
[54] *Id.* at 2788.
[55] *See id.* at 2787.
[56] *Id.* at 2782-88.

> The purpose of the presentment requirement is to establish a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body . . . . The primary inducement to conferring the power in question upon the Executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passage of bad laws through haste, inadvertence or design.[57]

The Constitution requires presentment to the President of "[e]very Order, Resolution, or Vote to Which the Concurrence of the Senate and the House of Representatives may be necessary . . . ."[58] Whether particular congressional actions are subject to the presentment requirement depends, according to the *Chadha* majority, upon whether the actions " 'contain matter which is properly to be regarded as legislative in its character and effect.' "[59] The Court concluded that the House resolution vetoing the suspension of Chadha's deportation was legislative "in its character and effect" because it "altered Chadha's status" under the immigration law.[60] The resolution therefore violated article I because it was the legal equivalent of private legislation amending or repealing the standards of the Immigration and Nationality Act as they applied to Chadha:

> Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.[61]

Two principles emerge from *Chadha*. First, as the case holds, legislative action that purports to alter the legal rights, duties, and relations of persons outside the legislative branch must comply with the constitutional procedure set forth in article I, including presentment to

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[57] *Id.* at 2782 (quoting THE FEDERALIST No. 73, at 469-70 (A. Hamilton) (B. Wright ed. 1961)).

[58] U.S. CONST. art. I, § 7, cl. 3.

[59] *Chadha*, 103 S. Ct. at 2784 (quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897)).

[60] *Chadha*, 103 S. Ct. at 2784-85.

[61] *Id.* at 2786 (footnote omitted).

the President. Second, as the last sentence of the above quoted passage suggests, congressional authority, once delegated to the executive, may not be altered or revoked extra-legislatively.

It is these two principles that jeopardize the concurrent resolution termination provision embedded in the War Powers Act. The constitutionality of that provision will turn on two questions: (1) Does a concurrent resolution ordering a termination of hostilities alter the legal rights, duties, and relations of those outside the legislative branch?, and (2) Does such a resolution amount to an extra-legislative revocation of previously delegated authority? To answer these questions one must first consider the constitutional allocation of war powers between Congress and the President, and then one must understand the effect of the War Powers Act on that allocation.

III. THE CONSTITUTIONAL ALLOCATION OF THE WAR POWERS BETWEEN CONGRESS AND THE PRESIDENT

Both Congress and the President can point to text in the Constitution in support of their claims to the right to exercise the war powers. Congress was assigned the power to declare war,[62] to raise and support armies,[63] and to provide and maintain a navy.[64] The President was given the office of commander in chief [65] and the responsibility for the nation's foreign policy.[66] This textual division of war-related powers has spawned considerable literature debating the constitutionality of presidential deployment of American military forces in the absence of a congressional declaration of war. The courts, in a few cases, have also contributed to this discussion.

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[62] U.S. CONST. art. I, § 8, cl. 11.

[63] *Id.* art. I, § 8, cl. 12.

[64] *Id.* art. I, § 8, cl. 13. In addition, many of the other powers enumerated in § 8 are arguably war powers, including the power to lay and collect taxes for the common defense, to define and punish piracies, to grant letters of marque and reprisal, to make rules concerning captures on land and water, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia, and to provide for organizing, arming, and disciplining the militia. These powers are enhanced by Congress's power under the necessary and proper clause.

[65] *Id.* art. II, § 2, cl. 1.

[66] *Id.* art. II, § 2, cl. 2 (treaty-making power); *id.* art. II, § 3, cl. 3 (receive ambassadors). An extremely broad reading of presidential foreign affairs power was recognized in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). This opinion found certain inherent sovereign powers to be vested in the President.

While the President is vested with general authority to direct foreign affairs, Congress has the power to regulate commerce with foreign nations. *See* U.S. CONST. art. I, § 8, cl. 3.

A. *View of the Commentators*

On the issue of "presidential wars," commentators have looked to the intent of the Framers; the literature is replete with citations to the Gerry-Madison Amendment in the Committee of Detail[67] and to vari-

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[67] The key discussion of war powers in the Constitutional Convention was as follows:

> "To make war"
>
> Mr. Pinkney opposed the vesting this power in the Legislature. Its proceedings were too slow. It wd. meet but once a year. The Hs. of Reps. would be too numerous for such deliberations. The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolution. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one- authority to make war, and another peace.
>
> Mr. Butler. The Objections agst the Legislature lie in a great degree agst the Senate. He was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it.
>
> Mr. M(adison) and Mr. Gerry moved to insert "*declare*," striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.
>
> Mr Sharman thought it stood very well. The Executive shd. be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.
>
> Mr Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.
>
> Mr. Elseworth. there is a material difference between the cases of making *war*, and making *peace*. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration. peace attended with intricate & secret negociations.
>
> Mr. Mason was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred "*declare*" to "*make*".
>
> On the Motion to insert *declare* - in place of *Make*, (it was agreed to.)
>
> N.H. no. Mas. abst. Cont. no.* Pa ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. ay. Geo-ay. [Ayes—7; noes—2; absent—1.]
>
> Mr. Pinkney's motion to strike out whole clause, disagd. to without call of States.
>
> Mr Butler moved to give the Legislature power of peace, as they were to have that of war.
>
> Mr Gerry 2ds. him. 8 Senators may possibly exercise the power if vested in that body, and 14 if all should be present; and may consequently give up part of the U. States. The Senate are more liable to be corrupted by an Enemy than the whole Legislature.
>
> On the motion for adding "and peace" after "war"
>
> N.H. no. Mas. no. Ct. no. Pa. no. Del. no. Md. no. Va. no. N.C. (no) S.C. no. Geo. no. [Ayes - 0; noes - 10.]
>
> Adjourned

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318-19 (M. Ferrand ed.

ous segments of the Federalist.

One group of commentators argues that Congress controls war-making.[68] For support it relies upon Alexander Hamilton's explanation of how the British institutional arrangement of war powers would differ from that contemplated by the Constitution:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies, -all which by the Constitution under consideration would appertain to the legislature.[69]

While these commentators recognize that the President may have the authority under the commander-in-chief clause to repel attacks against the United States,[70] they reject the view that the President may constitutionally sustain military operations without congressional

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1911) (footnotes omitted). This section is cited by almost all commentators on the war powers. *See* Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 40 & n.85 (1972); Department of State, Office of the Legal Adviser, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1101 (1966); Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675-76 (1972); Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 466-69 (1971); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1285 n.139 (1969); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 865 (1972); Van Alstyne, *supra* note 20, at 6-7; Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1773 & n.16 (1968).

[68] *See* Berger, *supra* note 67, at 36-46; Lofgren, *supra* note 67, at 699; Ratner, *supra* note 67, at 469-70; Van Alstyne, *supra* note 20, at 9.

Professor Lofgren argues further that the allocation to Congress of the power to grant letters of marque and reprisal was a conscious decision to vest "Congress with control over the commencement of war, whether declared or undeclared." Lofgren, *supra* note 67, at 697.

[69] THE FEDERALIST No. 69, at 446 (A. Hamilton) (B. Wright ed. 1961) (footnote omitted), *cited in* Berger, *supra* note 67, at 38; Lofgren, *supra* note 67, at 685; Van Alstyne, *supra* note 20, at 8.

While this section of *The Federalist* is concerned with the concentration of powers in the federal government, rather than the division between Congress and President, it recognizes that the nation needed flexibility to ensure national security: Professor Ratner takes this analysis a step further to conclude that the President's power to "repel sudden attack" must have a more expansive meaning in the modern world of rapid mobilization and global interests. *See* Ratner, *supra* note 67, at 466-69.

[70] This conclusion would seem inescapable given the Madison-Gerry Amendment discussed *supra* note 67. *See also infra* note 77 and accompanying text.

authorization.[71]

Other commentators assert that the President's war-making powers are broader,[72] arguing that the Constitution contemplates a shared power to wage war rather than an exclusive allocation of war powers to the Congress. They see the Framers as pragmatists, keenly concerned for the survival of the nation, and as establishing a flexible cooperative scheme of governmental power. Again, Hamilton's views are cited:

> [I]t is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the powers to which the care of it is committed.[73]

The conclusion that these commentators draw is that the Constitution envisions a "pattern of shared constitutional authority in this vital area . . . . [N]ot an hermetic separation of powers, but a scheme of divided power—what Hamilton called an intermixture of powers, [is] the only effective way to prevent a monopoly of power in any one branch of government."[74]

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[71] *See* Berger, *supra* note 67, at 54 ("[T]he transformation of the 'repel sudden attacks' exception of Madison and Gerry into an alleged presidential power, without congressional authorization, to commit the armed forces to battle against invasion of Korea or Vietnam can find no warrant either in the constitutional text or in the understanding of the Framers."); Lofgren, *supra* note 67, at 700 ("Taken together, then, the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war."); Van Alstyne, *supra* note 20, at 13 ("In the absence of a declaration of war by the Congress, the President may not sustain the systematic engagement of military force abroad for any purpose whatever.").

[72] *See* Reveley, *supra* note 67, at 1283-84; Rostow, *supra* note 67, at 847; *see also* Department of State, *supra* note 67, at 1100-01.

[73] THE FEDERALIST No. 23, at 200 (A. Hamilton) (B. Wright ed. 1961) (emphasis omitted), *cited in* Rostow, *supra* note 67, at 845 n.23; *see also* J. JAVITS, WHO MAKES WAR 12 (1973) (quoting the passage and pointing out Hamilton's bias towards executive power, which led him later to conclude that the President's foreign policy authority could "determine the condition of the nation, though it may in its consequences affect the exercise of the power of the legislature to declare war").

Many of the commentators who rationalize the President's exercise of the war powers as part of our "living Constitution" point to the long history of presidential war-making. *See* sources cited *supra* note 3. The Supreme Court, however, has not accepted the concept of constitutionalization through usage. *See* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("[p]ast practice does not, by itself, create power" but only a presumption that Congress has consented to the President's actions).

[74] Rostow, *supra* note 67 at 847; *see also* E. KEYNES, *supra* note 27; A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 1-60 (1976).

B. *View of the Courts*

No definitive answer on the scope of presidential war-making has been forthcoming from the courts. One early Supreme Court case indicated that Congress's war powers were plenary. In *Talbot v. Seeman*[75] the Court stated, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this [inquiry into the situation between the United States and France]."[76]

Such a sweeping allocation of the war powers to Congress is not found again. In determining whether President Lincoln had the power, without prior authorization from Congress, to institute a blockade of the Confederate States, the Court recognized an independent constitutional grant of war powers to the President:

> By the Constitution, Congress alone has the power to declare a national or foreign war . . . . [The President] has no power to initiate or declare a war against a foreign nation . . . .
>
> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.[77]

The most recent judicial statements on presidential war-making came in response to challenges to American involvement in Vietnam. Unfortunately, they contributed little to efforts to define presidential war-making powers because, as discussed above,[78] no case reached the issue that the War Powers Act was intended to address: the constitutionality of presidential deployment of United States troops in the absence of congressional authorization.

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[75] 5 U.S. (1 Cranch.) 1 (1801). The issue in *Talbot* was whether Congress had authorized a partial war against France so that French ships could be denominated "enemy" for purposes of the law of salvage. A similar issue was litigated in Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800). There, the Justices recognized that Congress could authorize hostilities either through a declaration of war or through less formal means. Declared war, Justice Washington stated, is perfect war. "But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war. . . ." *Id.* at 40. Neither of these cases concerned the issue of executive war-making.

[76] *Talbot*, 5 U.S. (1 Cranch) at 28.

[77] The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862). In Durand v. Hollins, 8 F. Cas 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186), the President's authority to use the military to protect the lives and property of American citizens abroad was recognized.

[78] *See supra* note 27 and accompanying text.

Some of the cases, however, discussed the constitutional allocation of war powers between the executive and legislative branches. Most courts concluded that the powers were shared by the two branches,[79] although the Second Circuit suggested that "the congressional power to declare war . . . was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative . . . ."[80]

There is no consensus among the commentators or the courts as to the constitutional allocation of war powers between Congress and the President. Unquestionably, the President has some power to use military force without congressional authorization, but it is unclear how far, beyond repelling attacks, this power extends. There are two plausible views on this point. First, this power may extend no further, in which case Congress may be seen as having exclusive control over the war powers. Alternatively, presidential power to use military force without congressional approval may extend to a range of circumstances, in which case Congress and the President may be seen as sharing the war powers. As will be discussed in part VI, whichever of these views prevails will be important in determining the effect of *Immigration and Nationalization Service v. Chadha*[81] on the concurrent resolution provision of the War Powers Act.

IV. Interpreting the War Powers Act

A second factor relevant to the constitutionality of the termination provision of the War Powers Act is the actual operative effect of the

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[79] *See* Mitchell v. Laird, 488 F.2d 611, 613-14 (D.C. Cir. 1973) ("[T]here are some types of war which, without Congressional approval, the President may begin to wage . . . . In such unusual situations necessity confers the requisite authority upon the President."); Massachusetts v. Laird, 451 F.2d 26, 32 (1st Cir. 1971) ("The Constitution does not contain an explicit provision to indicate whether these interdependent powers can properly be employed to sustain hostilities in the absence of a Congressional declaration of war."); Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970) ("[T]he power to commit American military forces under various sets of circumstances is shared by Congress and the executive."), *aff'd sub nom.* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Drinan v. Nixon, 364 F. Supp. 854, 859 (D. Mass. 1973) ("There is ample authority to support the proposition that Congress does not have the exclusive right to determine whether or not the United States will engage in war."); Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa.) ("[T]he courts that have considered the war-making power of the United States have all agreed that such power is shared by the executive and legislature to the exclusion of the courts."), *aff'd*, 411 U.S. 911 (1973).

For an overview of a variety of theories that have been used to justify presidential war-making, see Mottola v. Nixon, 318 F. Supp. 538, 540-45 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972).

[80] Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970), *aff'd sub nom.* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

[81] 103 S. Ct. 2764 (1983).

Act. The Act may be interpreted as having any of three different effects; these different interpretations incorporate the two assumptions discussed in part IV as to the constitutional allocation of war powers.

The first two interpretations start from the premise that Congress has exclusive control of the war powers and that any presidential use of military force without congressional approval would be unconstitutional unless it fell within the exception related to repelling sudden attacks.[82] The first views the Act as having no legislative effect whatsoever—the Act merely sets forth a congressional plan of action to be followed should the President act in an unconstitutional manner. The Act makes clear the possible responses: Congress can make explicit its disapproval by passing a concurrent resolution calling for termination of the action; it can ratify or authorize the President's action post hoc; or it can do nothing, relying on the sixty-day limit to force a termination of the action.

A second interpretation of the Act, also premised on congressional control of the war powers, views the Act as delegating limited war-making authority to the President. From this perspective, the War Powers Act constitutes congressional authorization to the President to wage war for up to sixty days.[83]

A third interpretation of the Act rests on the assumption that the war powers are constitutionally shared between Congress and the President, there being no clear delineation of each branch's powers. The classic description of this situation is found in Justice Jackson's concurring opinion in the *Steel Seizure Case*.[84] There, Jackson stated that "[p]residential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress."[85] He then

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[82] *See supra* notes 68-71 and accompanying text.

[83] *See* T. EAGLETON, WAR AND PRESIDENTIAL POWER 221 (1974) (decrying the Nixon administration's interpretation of the Act as a general delegation of congressional war powers to the President).

[84] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 634-55 (1952). This Comment relies upon the Jackson taxonomy to illustrate the separation of powers issues inherent in the War Powers Act, without claiming that it gives a definitive solution. As Justice Rehnquist noted,

> Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful . . . it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.

Dames & Moore v. Regan, 453 U.S. 654, 669 (1981).

For background information on the *Steel Seizure Case*, see M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

[85] *Youngstown Sheet and Tube*, 343 U.S. at 635 (Jackson, J., concurring).

identified three zones of presidential power:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .[86]

Thus, the constitutionality of presidential action must be judged by the scope of the President's independent authority to exercise certain power (for example, the war powers) and by the restraints that may legitimately be placed upon presidential exercise of that power by the other branches.

Relying on this perspective on the separation of powers between the two branches, this third interpretation sees the War Powers Act as neither a delegation nor a nondelegation of congressional war powers to the President. Rather, it views the Act as a recognition that these powers are shared by Congress and the President, with the President's powers falling into Jackson's "zone of twilight." According to this interpretation, however, the Act provides Congress with a mechanism with which it can shift presidential action from this middle zone to the third zone, thereby reducing presidential power to its "lowest ebb" by placing it in direct conflict with the expressed will of Congress. That mechanism is the concurrent resolution provision.

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[86] *Id.* at 635-37 (footnotes omitted).

V. THE WAR POWERS ACT AFTER *Chadha*

Drawing on part III's discussion of two perspectives on the constitutional allocation of war powers between Congress and the President, part IV suggested three interpretations of the War Powers Act. Each interpretation has different implications for the constitutionality of the concurrent resolution termination provision of the Act; this part considers that provision in light of *Immigration and Naturalization Service v. Chadha*.[87]

Because the lawfulness of the concurrent resolution provision may turn on which of the three interpretations of the Act prevails, this part assesses the provision in the context of each interpretation. To determine the constitutionality of the provision, the effect of passage of a concurrent resolution ordering a termination of presidentially initiated hostilities, as such effect is suggested by each interpretation, is measured against the two principles articulated in *Chadha*: (1) legislative action purporting to alter the legal rights of persons outside the legislative branch must comply with the constitutional procedure set forth in article I, including presentment to the President; and (2) congressional authority, once delegated to the executive, may not be altered or revoked extra-legislatively.[88]

A. *Congressional Power—No Delegation*

If Congress has the exclusive right to exercise the war powers and the War Powers Act expresses Congress's determination not to delegate war-making authority to the President except by declaration of war or by other specific statutory authorization,[89] the concurrent resolution provision is not invalidated by *Chadha*. First, as to the effect on the legal rights of those outside the legislature, passage of a concurrent resolution under the Act would not alter the President's right to wage war because, from this vantage, the President possesses no war power that a resolution could alter. Unlike the legislative veto at issue in *Chadha*, which purportedly changed the executive's power to control Chadha's status, adoption of a concurrent resolution under the Act would only express Congress's belief that the President is acting unconstitutionally. It would not purport to affect the President's constitutional powers or duties and thus would not be subject to the procedural requirements of article I.

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[87] 103 S. Ct. 2764 (1983).
[88] *See supra* text following note 61.
[89] *See supra* text following note 82.

With respect to the delegation principle, congressional use of the Act's concurrent resolution provision would also be distinguishable from the legislative veto at issue in *Chadha*. In the Immigration and Nationality Act[90] Congress delegated a measure of its constitutional power to "establish an uniform Rule of Naturalization,"[91] to the executive. If the War Powers Act does not delegate authority, the adoption of a concurrent resolution under the Act would not alter or revoke an existing delegation of authority to the executive branch, as the *Chadha* majority claimed occurred when Congress vetoed the immigration judge's suspension of Chadha's deportation.[92] Rather, if one accepts the characterization of the concurrent resolution as Congress's statement to the President "that it did not wish to declare war,"[93] passage of the resolution would be nothing more than a specific refusal by Congress to authorize the President to make war.

This characterization of the concurrent resolution resembles the analysis set out by Justice White in his *Chadha* dissent. He analogized the executive branch's decision to suspend Chadha's deportation to a "proposal for legislation";[94] the legislative veto simply constituted one House's refusal to adopt the executive's proposal. This analysis holds considerable logical appeal with respect to the concurrent resolution provision of the War Powers Act.

As Senator Javits noted, the nondelegation language[95] and the concurrent resolution provision were intended to place

> a big responsibility upon the President as well as the Congress. The initiative in generating 'specific statutory authorization' to meet contingencies and developing crises may in most instances come from the President. As the conductor of foreign policy, with all the information and intelligence resources at his command, it will be incumbent upon him to present the case to Congress and the nation.[96]

Thus, Justice White's "proposal for legislation" theory is relevant to presidential action under the Act. Lacking constitutional authority to maintain a military deployment without congressional approval, the President initiates a proposal for legislation by complying with the

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[90] 8 U.S.C. §§ 1101-1525 (1982).
[91] U.S. CONST. art. I, § 8, cl. 4.
[92] *See Chadha*, 103 S. Ct. at 2786.
[93] *Hearings, supra* note 44, at 93 (statement of Rep. Zablocki).
[94] *Chadha*, 103 S. Ct. at 2808 (White, J., dissenting).
[95] *See supra* notes 36-40 and accompanying text.
[96] 119 CONG. REC. 1399 (1973) (statement of Sen. Javits).

Act's reporting requirements,[97] starting the sixty-day clock.[98] The President thus proposes a war. Either the passage of a concurrent resolution or the expiration of the sixty-day period indicates congressional refusal to adopt the proposed "legislation." Use of the concurrent resolution, according to Justice White's reasoning, is constitutionally permissible because the Constitution does not require presentment to the President of any resolution or bill which only expresses a refusal to legislate.

B. *Congressional Power—Delegation*

Alternatively, if Congress has exclusive control over the war powers, and the War Powers Act is viewed as a limited delegation of congressional war-making power to the President,[99] the concurrent resolution would seem to be an unconstitutional *Chadha*-type legislative veto. From this perspective, the resolution would resemble the traditional legislative veto: Congress delegates general authority to the executive (to make war for sixty days) subject to a case-by-case review and veto of executive actions (termination of hostilities by concurrent resolution). According to *Chadha*, this type of extra-legislative power over delegated authority subverts the systems of checks and balances and is unconstitutional.

C. *Shared Powers—Jackson's Zone of Twilight*

The most plausible explanation of the War Powers Act, based on constitutional and legislative history, is that it attempts to define executive and legislative power in a zone of shared responsibility.[100] Assuming that the war powers are shared between the two branches, Justice Jackson's three-zone structure can be used to consider the constitutionality of the concurrent resolution.

Once a presidential military deployment has set into motion the Act's reporting requirements and sixty-day period, the issue before Congress is whether and how to respond. Congress has three options: (1) it may grant the President specific statutory authorization for continued deployment; (2) it may do nothing and thereby require the President to terminate the deployment upon expiration of the sixty-day period; or (3) it may state by concurrent resolution its refusal to authorize the deployment and order the President to terminate it.

Should Congress exercise the third option and pass a concurrent

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[97] 50 U.S.C. § 1543.
[98] *See id.* § 1544(b).
[99] *See supra* text accompanying note 83.
[100] *See supra* text accompanying note 86.

resolution, formerly lawful presidential action would become unlawful. Congress's enactment of a resolution purportedly recasts the President's military deployment from the "zone of twilight" to the third zone, where presidential power is at its lowest ebb. Congress instructs the President to terminate a military action that was not unlawful prior to the congressional action. It frames its instruction in a manner that does more than refuse to legislate its approval. The resolution is a directive stating that the military "forces shall be removed by the President."[101]

Under *Chadha*, the Constitution demands that such a directive, if it is "legislation"—that is, if it purports to alter the legal status of executive branch action[102]—be presented to the President for signature or veto. The concurrent resolution provision of the War Powers Act clearly attempts to change the legal status of presidential action, to shift that action from the "zone of twilight" to Justice Jackson's third zone, where Presidential action is highly suspect and potentially illegal. Like the veto resolution in *Chadha*, the concurrent resolution here purports to have the force of a statute. It would be unconstitutional unless presented to the President.

CONCLUSION

Congressional concern over the ineffectiveness of "presidential wars" and congressional realization that the courts would not impose limits on presidential war-making led to enactment of the War Powers Act in 1973. A central part of the Act was a provision that allowed Congress, by passage of a concurrent resolution, to order termination of presidentially initiated hostilities. Such a resolution does not have to go to the President for approval and thus cannot be vetoed.

In *Chadha*, the Supreme Court held unconstitutional the device known as the legislative veto because it failed to comply with certain procedural requirements specified in article I, including the requirement that legislation be presented to the President for approval. The case raises questions about the constitutionality of the concurrent resolution provision of the War Powers Act because of the provision's resemblance to the legislative veto struck down in *Chadha*.

This Comment has argued that the constitutionality of the concurrent resolution provision in the Act will depend upon how the Constitution is interpreted to allocate the war powers between the Congress and the President and how the Act affects that allocation. If Congress has exclusive control over the war powers and the Act does not delegate

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[101] 50 U.S.C. § 1544(c).
[102] *Id.*

any of that power to the President, the passage of a concurrent resolution ordering an end to hostilities would not, according to *Chadha*, be unconstitutional.

Under a different interpretation of the constitutional allocation of war powers, however, exercise of the concurrent resolution provision may be unconstitutional. First, if Congress has exclusive control over the war powers but the Act delegates some of those powers to the executive, passage of a concurrent resolution would be constitutionally void in light of the *Chadha* principles. Likewise, if the war powers are shared by the two branches and passage of a concurrent resolution represents an effort by Congress to render unlawful previously lawful presidential action, use of the concurrent resolution provision would violate the Constitution.